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No. 00-1497

In the

# Supreme Court of the United States

CITY OF YONKERS,

*Petitioner,*

*v.*

UNITED STATES and YONKERS BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## STATEMENT

Yonkers Branch, National Association for the Advancement of Colored People, respectfully submits this brief in opposition to the City of Yonkers' petition for certiorari.

## REASONS FOR DENYING CERTIORARI

### THE COURT OF APPEALS' DECISION CONFLICTS WITH NO PRECEDENT OF THIS COURT AND CREATES NO INTRA-CIRCUIT CONFLICT

The City of Yonkers has provided no basis for this Court to grant its petition for a writ of certiorari. Its hysterical and distorted arguments ignore the history of *United States v. Yonkers* and its own continued disregard of Court orders. To this date, in its fifth year of a program intended to provide 100 affordable housing units/year to remedy past segregation and discrimination, the City has provided fewer than *200* total units. And of these, at least 30% of the counted "moves" have exacerbated racial segregation, not been integrative in any manner.

Having been granted "local control" in November 1996 to ensure construction of new assisted housing, which it had stalled for years of non-cooperation, Yonkers has failed to even commence construction at two of the four sites, Hoover Road and East Grassy Sprain Road. To date, two households have occupied any newly constructed unit, both within the last month at Cross Street.

Yonkers argues that neither the district court nor the Court of Appeals made "intensive" findings that racial classification was necessary in devising a remedy order. This is nonsense. As Yonkers administered the remedy before the December 1999 Court Order, white families with *no* claim to relief received more assistance than hundreds of minority families

which had been victimized by racial discrimination and segregative practices.

Petitioner has cited no case of this Court or of any Circuit which conflicts with the decision of the Court of Appeals for the Second Circuit.

Yonkers cites to several cases in which this Court has overturned or limited *voluntarily* implemented affirmative action programs intended to relieve under-representations of minorities in municipal employment, contracting or one or another area of our nation's social or commercial life. *See, Adarand Constructions, Inc. v. Pena*, 115 S.Ct. 2097, 2107, 132 L.Ed.2d 158 (1995) (applying strict scrutiny to such affirmative action programs when adopted by the federal government, as opposed to state or local governmental units, and remanding for further fact-finding). It is clear that in *these* contexts, where there has been no adjudication that government, at any level, has violated the constitutional rights of racial minorities, this Court has severely restricted the use of race conscious remedies. For example, in *Adarand, supra.*, Justice O'Connor reviewed how this Court has treated two kinds of cases: those in which racial or ethnic minorities challenged governmental classifications which *disadvantaged them* in a *de jure* manner, *i.e., Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954) (requiring federal government not to use racial classifications which adversely limit the rights of racial minorities and finding *such* classifications odious) and those in which governments voluntarily adopted affirmative action programs of one or another sort to benefit racial minorities. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (plurality opinion by Justice Powell requiring exacting judicial review of any racial classification adopted by legislative or administrative branches of government); *Wygant v. Jackson Board of Ed.*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (reviewing voluntarily

adopted policy by School Board governing lay-offs of teachers); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct.706, 102 L.Ed.23d 854 (1989) (reviewing voluntarily adopted municipal set-aside program and holding that strict scrutiny was to apply to racial classification, regardless of group alleged to benefit). In both of these settings, this Court has required exacting review under the strict scrutiny standards of programs which intentionally deprive or intentionally advantage racial minorities.

However, these cases have developed parallel to another, equally plain judicial doctrine — that Courts of equity, having found that government action has intentionally violated the constitutional rights of racial minorities, have broad equitable authority to shape appropriate, race-based remedies. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15-16, 91 S.Ct. 1267, 1276, 28 L.Ed.2d 554 (1971).

Where, for instance, *federal courts* have concluded that school districts or municipalities have engaged in intentional violations of the Equal Protection clause, the same "legislative findings" as are referenced in *Croson*, *supra.*, are not required before use of race-conscious remedies.[1] This follows the basic principle that the federal courts' role in such cases is to right the constitutional wrong and put the affected class in the position they would have been in absent the constitutional violation. The nature and scope of the remedy is determined by the nature and scope of the underlying constitutional violation. *Milliken v. Bradley*, 418 U.S. 717, 738, 94 S.Ct. 3112, 3124, 41 L.Ed.2d 1069 (1974). As the Second Circuit has noted, this Court has not required that the "least restrictive means of implementation" be adopted in remedial

[1] While noting the distinction between the respect due judicial findings warranting remedy and the analysis applied when legislative majorities adopt race-conscious programs, the Court of Appeals for the Second Circuit did not rely on this distinction below, holding, instead, that the district court's order "clearly survives even strict scrutiny." (16a).

context, but has rather "recognized that the choice of remedies to redress racial discrimination is a 'a balancing process left, within appropriate constitutional or statutory limits to the trial court.'" *United States v. Paradise*, 480 U.S. 149, 107 S.Ct. 1053, 1073, 94 L.Ed.2d 203 (1987), cited in *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1236 (2d Cir. 1987).

Here, Yonkers excluded black and Hispanic families from housing opportunities in East and Northwest Yonkers for generations. An appropriate remedy requires actions by the City and its sub-divisions intended to provide housing opportunities for *these victims* in the cited sections of Yonkers. The remedy program is *not* intended for white people because white people were not the victims of the intentional segregative and discriminatory practices.

Yonkers argues that the court-ordered remedy excludes white people from housing benefits and equates this with the effects of voluntarily entered municipal programs which aim to direct governmental benefits to racial minorities. However, in logic, there is no such equation. In the first instance, a constitutional tortfeasor is ordered to provide *remedy*, benefits to those its conduct adversely affected. The rightful focus of such a remedial approach is, quite obviously, those intentionally deprived of benefit by the unconstitutional practice. In the second instance, local government seeks to re-direct certain benefits which it traditionally bestows, like employment opportunities or governmental contracts, *toward* one group, minorities. To be legitimate, such programs must be premised on what is tantamount to sustainable and rigorous legislative findings of prior racial discrimination. Absent such findings and the consequent need to *remedy*, albeit voluntarily, conditions which would otherwise predicate a lawful court order, race-consciousness in such voluntary programs is not permitted and offends the Fourteenth Amendment. The need to legislative findings which are analogous to findings

long since entered in this matter, *see*, *United States v. Yonkers Bd. of Educ.* 624 F.Supp. 1276 (S.D.N.Y. 1985) insures that racial classifications are not employed except where they must be — to remedy race-conscious discrimination and exclusion.

Correlatively, where judicial findings of exclusion have been made, race conscious remedies are not merely preferred — they are required. Any other regime would allow a federal court, and the federal judiciary, to direct governmental functions beyond the scope of the adjudicated violation, a clear usurpation of local authority. As applied here, the City of Yonkers' complaint that whites may participate in the judicially-crafted remedy more limitedly that blacks and Hispanics is simply another way of stating that the remedy is not a generalized program to provide housing subsidies to needy families — instead, it is an intentionally designed effort to cure racial segregation in housing patterns the petitioner City created and has still failed to remedy. The City's shrill claim that the district court is seeking some "racial balance" is a pejorative characterization of a perfectly legitimate judicial objective — providing racial minorities a genuine opportunity to move into white neighborhoods from which they have been excluded by systematic and long-since adjudicated government conduct.

What purpose would this housing remedy serve if it permitted, as Yonkers did between 1997–1999, white families to use scarce remedial resources to move from a white neighborhood to another or, even worse, from minority to white neighborhoods? It was this absurdity which Judge Sand's order of December 1999 was intended to curb. And, of course, this form of remedy administration puts the lie to Yonkers' claims that it has genuinely sought to remedy housing segregation for years since unfortunate missteps in 1988. In point of fact, Yonkers has continued to impede the remedy and tried the very considerable patience of the district court.

## CONCLUSION

This Court should deny Yonkers' petition for a writ of certiorari.

Dated: May 29, 2001
Goshen, New York

Respectfully submitted,

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